

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL GEORGE FELDER,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2005

No. 252307

Wayne Circuit Court

LC No. 03-005243-01

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to rob while armed, MCL 750.82, assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm during the commission of a felony, second offense, MCL 750.227b, and felonious assault, MCL 750.82. He was sentenced to prison terms of nine to fifteen years for the assault with intent to rob while armed conviction, nine to fifteen years for the assault with intent to do great bodily harm conviction, five years for the felony-firearm conviction, and one to four years for the felonious assault conviction. Defendant appeals as of right. We affirm.

This case arises from the shooting of Kevin Gladney. After being shot in the leg by defendant, Gladney shot defendant five times as he ran away.

Defendant first contends that he was deprived of a fair trial by the prosecutor's failure to use due diligence in obtaining Gladney's testimony as a res gestae witness.<sup>1</sup> We review a trial court's determination that proper due diligence was had for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

In Michigan, the prosecution is no longer required to produce every witness who may have knowledge of the crime for which a defendant is charged. *People v Burwick*, 450 Mich 281, 288; 537 NW2d 813 (1995). Instead, the former rule has been replaced by a notice system whereby the prosecutor is charged with the duty of listing all known witnesses to the charged

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<sup>1</sup> A res gestae witness is someone who witnessed some event in the continuum of the criminal transaction and whose testimony would have aided in developing a full disclosure of the facts at trial. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001).

crime and listing the witnesses he or she intends to call at trial. *Id.* at 288-289; MCL 767.40a(1)-(4). A prosecutor who endorses a witness under MCL 676.40a(3) is obliged to exercise due diligence to produce that witness at trial. *Eccles, supra* at 388. However, a prosecutor's failure to produce such a witness may be excused by demonstrating that the witness could not be produced despite the exercise of due diligence. *Id.*

Here, the prosecutor listed Gladney on the list of witnesses to be called and, therefore, the prosecution had a duty to exercise due diligence in obtaining his testimony. The record indicates that Gladney pleaded guilty to charges stemming from this incident, but failed to return to court for sentencing in August 2003. A police investigator attempted to personally serve Gladney at his home address approximately four weeks before defendant's trial. He called Gladney and left messages. The investigator also notified an Apprehension Watch Team to be on the lookout for Gladney. In addition, the officer spoke with Gladney's friends and family in an effort to reach him. Gladney's *capias* was also placed on a national database and returned no results. The prosecution's efforts to obtain Gladney complied with the due diligence requirement.

Defendant also contends that his Sixth Amendment right to confront the witnesses against him was violated when the trial court permitted Gladney's preliminary examination testimony to be read into the record after the prosecutor was unable to procure his presence at trial. We review a trial court's decision to admit evidence for an abuse of discretion and underlying questions of law de novo. *People v Shepherd*, 263 Mich App 665, 667; 689 NW2d 721 (2004).

A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1359; 158 L Ed 2d 177 (2004); *Shepherd, supra* at 668-673. A witness is a person who bears testimony against the accused in the form of a formal statement to government officers. *Crawford, supra* at 1364. The Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Id.* at 1365. Here, Gladney's preliminary examination testimony was clearly testimonial,<sup>2</sup> and, as a result, it could only be properly admitted against defendant if Gladney was both unavailable and defendant had the prior opportunity to cross-examine him.

A witness is considered unavailable if he or she is "absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance ... by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). "The test for whether a witness is 'unavailable' as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The good-faith effort standard is identical to the due diligence standard. *See id.* at 682-683 n 11. As already noted, the prosecution's efforts to obtain Gladney complied with the diligent good-faith effort requirement necessary to establish that he was unavailable.

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<sup>2</sup> See *Crawford, supra* (noting that ex parte testimony at a preliminary hearing is always testimonial).

Having determined that Gladney was properly considered unavailable, we must now determine whether defendant had a prior opportunity to cross-examine the witness. *Crawford, supra* at 1365. The preliminary examination testimony of a witness is admissible at trial where the witness is unavailable and the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony through cross-examination. *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998).<sup>3</sup> Whether a defendant had a similar motive to develop the testimony through cross-examination depends on the similarity of the issues for which the testimony was presented at each proceeding. *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986).

Gladney's preliminary examination testimony was originally elicited by the prosecution to establish defendant's guilt and was introduced in the actual trial for the same purpose. Likewise, defendant's trial counsel cross-examined Gladney at the preliminary examination in an effort to prove that defendant did not commit the crimes for which he was charged. Consequently, defendant had an opportunity to cross-examine Gladney and his motive in doing so was the same. Because Gladney was unavailable as required by the Confrontation Clause and defendant had the prior opportunity to develop his testimony through cross-examination, Gladney's preliminary examination testimony was properly admissible.

Defendant also argues that the prosecution failed to present sufficient evidence to support his embezzlement conviction or that the verdict was against the great weight of the evidence. This Court reviews de novo challenges to the sufficiency of the evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). When reviewing a sufficiency of the evidence claim in a criminal case, "this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt." *People v Moorer*, 262 Mich App 64, 76-77; 683 NW2d 736 (2004). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of a crime." *Id* at 77.

The test for whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant was armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). The elements of assault with intent to do great bodily harm less than murder are: (1) an assault, i.e., an attempt or offer with force and violence

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<sup>3</sup> The *Meredith* Court also noted that the Confrontation Clause required a showing that the "testimony bears satisfactory indicia of reliability." *Meredith, supra* at 68, quoting *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L.Ed.2d 597 (1980). However, *Crawford* clarified that the Confrontation Clause's ultimate "goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but rather that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford, supra* at 1370. Consequently, the Confrontation Clause does not require further indicia of reliability beyond the prior opportunity of cross-examination.

to do corporal hurt to another coupled with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996). The elements of felonious assault are: (1) an assault; (2) with a dangerous weapon; and (3) with the intent to place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The elements of felony-firearm are: (1) the possession of a firearm, (2) during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

To the extent that the verdict depended on credibility, the standard of review for the sufficiency of evidence is deferential, and requires a reviewing court to draw all reasonable inferences and resolve credibility conflicts in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Two witnesses testified that defendant pulled a handgun on them as they stood on the porch of a residence. Defendant pointed the gun directly at Gladney's head. One of the witnesses recognized defendant's gun as a black nine-millimeter handgun. Another witness noticed defendant pull the gun on the individuals on the porch. The individuals on the porch indicated on the record that they were afraid when defendant pulled the gun and told them to "empty their pockets and give him what they had." One witness observed Gladney "tussle" with defendant. In addition, that witness observed defendant shoot Gladney in the leg. The evidence presented demonstrates that defendant possessed a firearm and that he possessed the firearm during the commission of a felony (i.e., during the commission of an assault with intent to rob and an assault with intent to do great bodily harm less than murder). Therefore, we conclude that there was sufficient evidence to support the verdict. We also conclude that the verdict was not against the great weight of the evidence because the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

Defendant also argues that his felonious assault conviction should be vacated. However, defendant has not properly presented this claim for review because it was not raised in his statement of questions involved on appeal as required by MCR 7.212(C)(5). *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

Lastly, defendant argues that his felony-firearm sentence was improperly enhanced. Issues regarding enhanced statutory sentencing provisions are questions of law. This Court reviews questions of law de novo. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Due process protections afforded to defendants subject to such sentence enhancement provisions are less than those afforded to defendants for the substantive offense because the enhancement is not a separate element that must be proved beyond a reasonable doubt. Whenever sentence enhancement is authorized, due process does not require that the prosecution separately charge the defendant as a second offender, nor is the defendant entitled to an adversarial hearing before the prior convictions are used for sentencing purposes. *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996). For enhancement of a felony-firearm sentence due process is satisfied as long as the sentence is based on accurate information and the defendant has a reasonable opportunity at sentencing to challenge that information. *People v Miles*, 454 Mich 90, 100; 559 NW2d 299 (1997). Once a defendant challenges that information the prosecution must prove by a preponderance of the evidence that the information is accurate. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

At sentencing, defendant challenged the enhanced sentencing information. In response, the prosecution presented a certified copy of defendant's prior felony-firearm conviction. The prosecutor also presented a copy of defendant's criminal history, and gave the trial court the case number for defendant's prior felony-firearm conviction in order for the court to search its own database. The trial court searched its database and found defendant's prior case number, and defense counsel read into the record that defendant in fact had a prior conviction for felony-firearm. The sentence enhancement was clearly based on accurate information.

Affirmed.

/s/ Henry William Saad  
/s/ E. Thomas Fitzgerald  
/s/ Michael R. Smolenski